No. 99-898

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IN THE

Supreme Court of the United States

CITY OF CHICAGO,

Petitioner,

—v.—

SHALALA, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF THE ASIAN LAW CAUCUS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

		PAGE
I.	INTEREST OF *AMICUS CURIAE*	1
II.	SUMMARY OF ARGUMENT	1
III.	ARGUMENT	2
	A. The Welfare Reform Act Has Caused Enormous Suffering	2
	1. Hunger Increases Among Immigrant Households in the Wake of the Act	3
	2. The Effects of the Act Stretch Beyond the Benefits It Denies Legal Immigrants	5
	B. Although the Challenged Classifications Affect Immigrants, They Do Not Implicate The Sovereign Federal Power over Immigration and Should Not Receive Special Judicial Deference	6
	1. *Diaz* Does Not Give Congress and the President Free Rein to Discriminate Against Legal Immigrants	8
	2. A Century of This Court's Precedents Must be Ignored To Read *Diaz* as Granting Congress and the President Plenary Power over Immigrants	9

PAGE

3. To Read *Diaz* as Allowing Congress and the President to Define the Scope of Their Plenary Power Abdicates the Judicial Role 11

IV. CONCLUSION 13

TABLE OF AUTHORITIES

Cases

PAGE

Ambach v. *Norwick*, 441 U.S. 68 (1979) 10, 11

Baker v. *Carr*, 369 U.S. 186 (1962) 12

Bernal v. *Fainter*, 467 U.S. 216 (1984) 11, 12

Cabell v. *Chavez-Salido*, 454 U.S. 432 (1982) 10, 11

Chae Chan Ping v. *United States*, 130 U.S. 581 (1889) 9

Foley v. *Connelie*, 435 U.S. 291 (1978) 11

Fong Yue Ting v. *United States*, 149 U.S. 698 (1893) ... 9

Graham v. *Richardson*, 403 U.S. 365 (1971) 2

Harisiades v. *Shaughnessy*, 342 U.S. 580 (1952) 9

Keller v. *United States*, 213 U.S. 138 (1909) 10

Mathews v. *Diaz*, 426 U.S. 67 (1976) ..... *passim*

McLean v. *Crabtree*, 173 F.3d 1176 (9th Cir. 1999) ... 7

Moving Phones Partnership L.P. v. *Federal Communications Commission*, 998 F.2d 1051 (D.C. Cir. 1993) 7, 11

Rodriguez v. *United States*, 169 F.3d 1342 (11th Cir. 1999) 7

Russian Volunteer Fleet v. *United States*, 282 U.S. 481 (1931) 10

United States v. *Carolene Prods. Co.*, 304 U.S. 144 (1938) 2

United States v. *Lopez*, 514 U.S. 549 (1995) 12

PAGE

United States v. *Santos-Riviera*, 183 F.3d 367 (5th Cir. 1999), *cert. denied*, ___ S. Ct. ___, 1999 WL 1030096 (Dec. 6, 1999) 6, 7

Wong Wing v. *United States*, 163 U.S. 228 (1896) 10, 12

Youngstown Sheet & Tube Co. v. *Sawyer*, 343 U.S. 579 (1952) 12

Statutes

Pub. L. No. 104-113, tit. iv, §§ 402-403, 110 Stat. 2262-67 (1996) 3

Pub. L. No. 105-185, §§ 504, 506-507, 112 Stat. 578-79 (1998)..... 3

Miscellaneous

All Things Considered, *Many Families Who Are a Mix of Citizens and Non-Citizens Find It Difficult to Receive Federal Welfare Assistance* (National Public Radio broadcast, Oct. 12, 1999) (transcript available in Lexis, News Library, Curnws File) 4

California Food Policy Advocates, *The Impact of Legal Immigrant Food Stamp Cuts in Los Angeles and San Francisco Counties* (May 28, 1998)..... 4

Center on Hunger, Poverty and Nutrition Policy, Tufts University, *Analysis of the Capacity of the Second Harvest Network to Cover the Federal Food Stamp Shortfall from 1997 to 2002* (1997) 4

PAGE

Michael Fix & Jeffrey S. Passel, *Trends in Non-Citizens' and Citizens' Use of Public Benefits Following Welfare Reform: 1994-1997* (Urb. Inst., Mar. 1999) 3, 5, 6

Michael Fix & Wendy Zimmerman, *All Under One Roof: Mixed Status Families in an Era of Reform* (Urb. Inst., June 1999) 3, 5

Physicians for Human Rights, *Press Release: Medical Group Finds High Prevalence of Food Insecurity and Hunger Among United States Legal Immigrant Populations* (May 7, 1998) 4

Cokie Roberts & Steven V. Roberts, *Hunger: A Startling Crisis*, USA Weekend (May 29, 1998) 4

Tufts University Center on Hunger, Poverty and Nutrition Policy, *Statement on the Link Between Nutrition and Cognitive Development in Children* (1998) 5

Wendy Zimmerman & Karen C. Tumlin, *Patchwork Policies: State Assistance for Immigrants Under Welfare Reform* (Urb. Inst., May 1999) 2, 3

Wendy Zimmerman & Michael Fix, *Declining Immigrant Applications for Medi-Cal and Welfare Benefits in Los Angeles County* (Urb. Inst., July 1998) 6

I. INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae, the Asian Law Caucus (the "Caucus"), has served poor Asian Americans longer than any other civil rights or legal services organization in the country. The Caucus regularly hosts free clinics for the Asian American community to advise and counsel them about immigration issues. The Caucus also represents poor Asian Americans before courts and administrative agencies, helping them to become citizens and to get the government benefits to which they are entitled. In short, the Caucus has a deep and abiding interest in this country's immigration and welfare policies.

This action falls squarely within this interest, raising questions about the scope and nature of judicial deference to the federal government's power over immigrants. The legislative and executive branches of the federal government have long been understood to have virtually unreviewable power over matters of immigration. Recent judicial decisions, without heed to decades of Supreme Court case law in this area, have extended this power over immigration to reach any matter involving immigrants. The Caucus submits this brief to assist this Court in its consideration of the distinction between power over immigration and power over immigrants.

II. SUMMARY OF ARGUMENT

Even as most Americans are enjoying a time of unparalleled prosperity, legal immigrants are poorer, hungrier, and sicker than they were just three years ago. This suffering is not the result of some economic quirk. It is a predictable consequence of a change in the treatment of legal immigrants by the federal government.

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[1] The parties have consented to the filing of this brief. Copies of the letters of consent have been filed with the Clerk of the Court. This brief was not written in whole or in part by counsel for a party, and no person or entity other than the *Amicus Curiae*, their members, and their counsel made a monetary contribution to the preparation and submission of this brief.

In 1996, Congress enacted and the President signed the Personal Responsibility and Work Opportunity Reconciliation Act or, as it is more commonly known, the Welfare Reform Act ("Act"). The Act made good on the bipartisan promises to "end welfare as we know it" and to trim the budget while leaving current benefit levels virtually unchanged for most recipients. The only way to accomplish this goal was to declare a large class of recipients ineligible for benefits. Congress and the President settled on legal immigrants, who, of course, lack a voice in the political process.

Unvarnished acts of political expediency that involve a "discrete and insular" minority, such as the Welfare Reform Act, typically receive a hostile reception in the courts. *See, e.g.*, *Graham* v. *Richardson*, 403 U.S. 365, 371 (1971) (quoting *United States* v. *Carolene Prods. Co.*, 304 U.S. 144, 152-53, n.4 (1938). In this case, however, lower courts have been led astray by a misreading of the Court's opinion in *Mathews* v. *Diaz*, 426 U.S. 67 (1976), and have concluded that Congress and the President can discriminate against legal immigrants at will. These decisions are wrong and should be reversed. A writ of certiorari should be issued to bring these questions of national importance before this Court.

III. ARGUMENT

A. The Welfare Reform Act Has Caused Enormous Suffering.

Legal immigrants have always struggled to make ends meet. Prior to the passage of the Welfare Reform Act in 1996, more than one in four legal immigrants lived below the poverty line. Wendy Zimmerman & Karen C. Tumlin, *Patchwork Policies: State Assistance for Immigrants Under Welfare Reform* 58 (Urb. Inst., May 1999). The Act made a bad situation worse by denying immigrants access to basic federal benefits such as Temporary Assistance of Need Families (TANF), Supplemental Social Security (SSI), Medicaid and

food stamps. *See* Pub. L. No. 104-113, tit. iv, §§ 402-403, 110 Stat. 2262-67 (1996). Although certain benefits have since been restored to very limited classes of legal immigrants, legal immigrants as a group are poorer, hungrier and sicker than they were in 1996. Zimmerman & Tumlin, *supra*, at 58.

This unprecedented change in the nation's welfare policy has left many legal immigrants with nowhere to turn. The Act neither helped legal immigrants gain the skills and education necessary to get jobs nor assisted them through the often Byzantine naturalization process in time to preserve their benefits. Instead, it pushed legal immigrants and their families into abject poverty. The cruelest stroke of all befell the citizen children of non-citizen parents. Although not themselves cut off from federal assistance, they have suffered the consequences of this descent into poverty along with their families. Michael Fix & Wendy Zimmerman, *All Under One Roof: Mixed Status Families in an Era of Reform* (Urb. Inst., June 1999).

1. Hunger Increases Among Immigrant Households in the Wake of the Act.

The Act declared 935,000 legal immigrants ineligible for food stamps. Michael Fix & Jeffrey S. Passel, *Trends in Non-Citizens' and Citizens' Use of Public Benefits Following Welfare Reform: 1994-1997* (Urb. Inst., Mar. 1999). Although benefits have been restored to some, *see* Agricultural Research Extension and Education Reform Act of 1997, Pub. L. No. 105-185, §§ 504, 506-507, 112 Stat. 578-79 (1998), more than 700,000 people who were once eligible for food stamps remain stricken from the rolls. Fix & Passel, *supra*. Predictably, legal immigrants now lack the food that they need. The consequences of this policy will be felt for years to come.

Legal immigrants now go hungry more often than any other identifiable segment of the population. Poverty regularly

forces 79% of Latino and Asian immigrant households in California, Texas and Illinois to cut their consumption of food below minimally sufficient levels. Physicians for Human Rights, *Press Release: Medical Group Finds High Prevalence of Food Insecurity and Hunger Among United States Legal Immigrant Populations* (May 7, 1998). *See also* California Food Policy Advocates, *The Impact of Legal Immigrant Food Stamp Cuts in Los Angeles and San Francisco Counties*, (May 28, 1998) (finding even more dramatic increases in hunger among legal immigrant households in San Francisco and Los Angeles following passage of the Welfare Reform Act). Moreover, nearly 10% of immigrant households suffer from "severe hunger." Physicians for Human Rights, *supra*. "Severe hunger" means frequently skipping certain meals or going without food for an entire day. *Id.* This rate of severe hunger is more than ten times that of the general population. *Id.*

Private charities have not been able to fill the gap left by the Welfare Reform Act, and will not be able to do so. Since passage of the Act, private shelters have been overrun. Food banks which served an average of 12 families a week prior to passage of the Act now serve up to 250 families a week. *See* All Things Considered, *Many Families Who Are a Mix of Citizens and Non-Citizens Find It Difficult to Receive Federal Welfare Assistance* (National Public Radio broadcast, Oct. 12, 1999) (transcript available in Lexis, News Library, Curnws File). This extraordinary surge in demand for free food has, for the first time, forced the charities and churches providing it to turn people away. *See* Cokie Roberts & Steven V. Roberts, *Hunger: A Startling Crisis*, USA Weekend, at 4 (Mar. 29, 1998). This crisis will grow in years to come as demand for food from private charity outpaces supply by more than 400%. *See* Center on Hunger, Poverty and Nutrition Policy, Tufts University, *Analysis of the Capacity of the Second Harvest Network to Cover the Federal Food Stamp Shortfall from 1997 to 2002* (1997).

The effects of the malnutrition engendered by the Welfare Reform Act will linger for years. Even mild hunger can cause irreparable damage. Hunger affects how children behave, learn and develop. *See* Tufts University Center on Hunger, Poverty and Nutrition Policy, *Statement on the Link Between Nutrition and Cognitive Development in Children* (1998) (suggesting that the consequences of hunger cost more than food necessary to cure it). Time does not remedy these effects. Children who go hungry today will almost certainly grow up to be less than fully productive adults. *Id.*

2. The Effects of the Act Stretch Beyond the Benefits It Denies Legal Immigrants.

The Welfare Reform Act has effectively severed legal immigrants and their citizen children from the national community. Some legal immigrants and their citizen children remain eligible for certain benefits even in the wake of the Act. Many, however, have failed to claim these benefits for fear of jeopardizing their or their family members' chances for permanent residency and citizenship. As a consequence, the American-born offspring of non-citizen immigrants have become a growing subclass of citizens who are suffering the consequences of the Act along with their non-citizen mothers, fathers, sisters and brothers. Michael Fix & Wendy Zimmerman, *All Under One Roof: Mixed Status Families in an Era of Reform* (Urb. Inst., June 1999).

Confusion and fear have reigned since passage of the Welfare Reform Act, leading many immigrants to forgo even the benefits for which they remain eligible. Non-citizen households' use of all welfare benefits fell by 35% between 1994 and 1997, while citizens' use of welfare fell by only 14%. Michael Fix & Jeffrey S. Passel, *Trends in Non-Citizens' and Citizens' Use of Public Benefits Following Welfare Reform: 1994-1997* (Urb. Inst., Mar. 1999). Although immigrants represented only 10% of the households receiving welfare in

1994, they accounted for almost a quarter of the overall decline in welfare caseloads by 1997. *Id.* Neither naturalization rates, income levels nor the Act's specific cuts account for this difference between citizens and non-citizens. *Id.* Rather the Act has discouraged immigrants from applying for those health, nutrition and housing benefits that they are still eligible to receive. *Id.*

This unfortunate and unanticipated consequence of the Welfare Reform Act has profoundly affected regions with large immigrant populations. In Los Angeles, for example, even though eligibility requirements did not change, the number of legal immigrant-headed households claiming California state welfare benefits between 1996 and 1998 fell by more than 70%, even as citizen claims for benefits held steady. Wendy Zimmerman & Michael Fix, *Declining Immigrant Applications for Medi-Cal and Welfare Benefits in Los Angeles County* (Urb. Inst., July 1998). Over this same period, claims by the citizen children of non-citizen parents fell by close to 50% while the claims of citizen children of citizen parents fell by a shade more than 5%. *Id.* In other words, non-citizen parents who lost federal benefits as a result of the Act are no longer applying for state benefits for their citizen children even though those children remain eligible for both state and federal benefits.

B. Although the Challenged Classifications Affect Immigrants, They Do Not Implicate the Sovereign Federal Power over Immigration and Should Not Receive Special Judicial Deference.

Laws singling out recognizable minority groups are typically subject to a rather searching inquiry by the courts. The Welfare Reform Act, unfortunately, has received a much warmer welcome. The lower courts, seizing upon language in this Court's opinion in *Mathews v. Diaz*, 426 U.S. 67 (1976), have concluded that Congress and the President's power over immigrants knows no bounds. *United States* v. *Santos-*

Riviera, 183 F.3d 367, 373 (5th Cir. 1999) (applying a "deferential rational basis test to federal statutes that classify based on alienage"), *cert. denied*, ___ S. Ct. ___, 1999 WL 1030096 (Dec. 6, 1999); *McLean* v. *Crabtree*, 173 F.3d 1176, 1185 n.11 (9th Cir. 1999) ("[I]n cases where federal interests predominate, judicial scrutiny of alienage classifications is relaxed to a 'rational basis' standard."); *Rodriguez* v. *United States*, 169 F.3d 1342, 1350 (11th Cir. 1999) ("[*Diaz*] is inescapably on point as to the level of scrutiny applicable in this case. It holds that a federal statute which discriminates among aliens in the provision of welfare benefits is subject only to rational basis scrutiny."); *Moving Phones Partnership L.P.* v. *FCC*, 998 F.2d 1050, 1056 (D.C. Cir. 1993) ("Supreme Court precedent instructs that classifications based on alienage in federal statutes are permissible so long as the challenged statute is not a 'wholly irrational' means of effectuating a legitimate government purpose."). The lower courts' understanding of *Diaz* is wrong.

This Court simply did not break with a century's worth of cases and render federal actions that affect immigrants immune from judicial review. In *Diaz*, this Court held that Congress can sometimes classify people based on their immigration status. This Court did not eliminate the distinction between power over immigration and power over immigrants.

The prevailing interpretation of *Diaz* threatens to disrupt checks on legislative and executive power long held by this Court. For a hundred years, this Court has carefully distinguished the regulation of immigration, to which the plenary power applies, from regulations affecting immigrants, to which it does not. By interpreting *Diaz* too broadly, lower courts have abandoned this distinction and, in so doing, have abdicated the role of the judiciary.

1. *Diaz* Does Not Give Congress and the President Free Rein to Discriminate Against Legal Immigrants.

By upholding a single alienage classification in *Diaz*, this Court did not signal that every such classification should be affirmed. Instead, this Court rejected the view that "all aliens must be placed in a single homogeneous legal classification." *Id.* at 78. The Court explained that there can be legitimate reasons for Congress and the President to make distinctions among aliens:

> For a host of constitutional and statutory provisions rest on the premise that a legitimate distinction between citizens and aliens may justify attributes and benefits for one class not accorded to the other; and the class of aliens is itself a heterogeneous multitude of persons with a wide-ranging variety of ties to this country.

Id. at 78-79.

In *Diaz*, this Court cited the plenary power over immigration to show that federal distinctions among immigrants can be legitimate, not to suggest that this power thwarts review of any discrimination against immigrants at the hands of the legislative and executive branches of the federal government. As this Court stated in *Diaz*, the existence of the plenary power shows that "[t]he fact that an Act of Congress treats aliens differently from citizens does not *in itself* imply that such disparate treatment is 'invidious.' " *Id.* at 80 (emphasis added). In holding that not all such distinctions are necessarily invidious, this Court did not rule out the possibility that disparate treatment of aliens might be invidious.

In fact, this Court took the extraordinary step of restating the question presented on certiorari to avoid any possible misunderstanding of the case. As briefed and argued, the question before this Court in *Diaz* was "whether discrimination between citizens and aliens is permissible . . . ." *Id.* at 80.

After further review, the Court rejected this statement of the issue. It concluded that the case, in fact, raised a different question: "whether the statutory discrimination *within* the class of aliens—allowing benefits to some aliens but not to others—is permissible." *Id.* (emphasis in original). By simply answering this question with a yes, this Court in *Diaz* did not exclude the possibility that some alienage classifications might violate the Constitution. Nevertheless, lower courts have treated *Diaz* as if it answered the question initially posed on certiorari and not the question answered by this Court.

2. A Century of This Court's Precedents Must Be Ignored to Read *Diaz* as Granting Congress and the President Plenary Power over Immigrants.

Reading *Diaz* to say that the federal government has plenary power over immigrants rather than over immigration, the lower courts have ignored not only the long line of cases that draw this distinction but also the reasons underlying the distinction. The federal power to establish rules governing the admission, exclusion, deportation, and naturalization of aliens derives from a line of Supreme Court decisions dating back to the end of the nineteenth century. The Court in those cases explained that Congress and the President's power over immigration, like the state and federal governments' power to define political community, is an "incident of sovereignty." *Chae Chan Ping* v. *United States*, 130 U.S. 581, 609 (1889) (announcing the doctrine of congressional plenary power over immigration for the first time). *See also Fong Yue Ting* v. *United States*, 149 U.S. 698, 711-14 (1893) (describing the origins of the federal power over immigration as relating to the control of international relations); *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-89 (1952) (explaining that the immigration power is "vitally and intricately interwoven with contemporaneous polices in regard to the conduct of foreign

relations, the war power, and the maintenance of a republican form of government").

From the beginning, this Court has limited this plenary power to matters of immigration policy, again and again distinguishing the regulation of immigration from the mere regulation of non-citizens. In *Wong Wing* v. *United States*, 163 U.S. 228 (1896), the Court relied upon this distinction to invalidate a federal law that condemned any Chinese alien unlawfully present in the United States to a year of hard labor without jury trial or due process. Similarly, in *Keller* v. *United States*, 213 U.S. 138 (1909), the Court turned to this distinction in rejecting the argument that a federal statute criminalizing the harboring of an alien for prostitution was within the plenary power because of "its general effect upon the importation and exclusion of aliens." This Court made the same point in *Russian Volunteer Fleet* v. *United States*, 282 U.S. 481 (1931), holding that a non-citizen could not be denied access to federal court merely because the United States did not then recognize the Soviet Union.

This Court has reinforced this distinction between immigrants and immigration in a line of cases dealing with alienage restrictions by the States. These cases establish that judicial deference is appropriate only when the government acts in a sovereign capacity, and make clear that this sovereign power does not include placing restrictions on eligibility of resident immigrants for subsistence benefits. To fall within the government's sovereign functions, a classification must be related to self-government. In other words, it must involve "defining the scope of the community of the governed and thus of the governors as well." *Cabell* v. *Chavez-Salido*, 454 U.S. 432, 439-40 (1982). Alienage classifications, although "fundamental to the definition and government of a State," are "ordinarily irrelevant to private activity." *Ambach* v. *Norwick*, 441 U.S. 68, 75 (1979).

Unless a state-drawn distinction between lawful immigrants and citizens relates to these sovereign powers, that distinction is subject to exacting scrutiny. The political function doctrine exempts from strict scrutiny only those classifications inherent in "defining . . . the community." *Cabell*, 454 U.S. at 440. Thus, although restrictions on who may be a public school teacher, *Ambach*, 441 U.S. 68, or probation officer, *Cabell*, 454 U.S. 432, may be within the exception, restrictions on who may be a notary public are not, *Bernal* v. *Fainter*, 467 U.S. 216 (1984). Strict scrutiny must be applied whenever state alienage classifications strike "at the non-citizen's ability to exist in the community." *Foley* v. *Connelie*, 435 U.S. 291, 296 (1978). *Accord Moving Phones*, 998 F.2d at 1056 (applying the language in *Foley* in a challenge to a federal regulation).

In *Diaz*, this Court effectively held that because of its role in the federal system, the federal government has a slightly broader sovereign power than the States. Nonetheless, the concerns that raise suspicions about alienage classifications drafted by the States—the inability of aliens to vote, the lack of English-speaking skills among many aliens, and common misperceptions about aliens—apply equally to Congress and the President. The States cannot discriminate against aliens for reasons unrelated to self-government. In the same way, when Congress and the President discriminate against immigrants for reasons utterly removed from the core immigration functions, they are not entitled to the extraordinary deference afforded by the plenary power.

3. To Read *Diaz* as Allowing Congress and the President to Define the Scope of Their Plenary Power Abdicates the Judicial Role.

Congress and the President's sweeping discretion within the plenary power requires that the courts actively police the boundaries of this power. To maintain the separation of powers, the courts must prevent the legislative and executive

branches from overreaching the "judicially enforceable outer limits of [their] powers." *United States* v. *Lopez*, 514 U.S. 549 (1995). In the seminal case about judicial deference in the face of political questions, this Court highlighted the importance of its boundary-patrolling function:

> Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, *or whether the action of that branch exceeds whatever authority has been committed*, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.

Baker v. *Carr*, 369 U.S. 186, 211 (1962) (emphasis added).

Close judicial scrutiny is essential when Congress and the President seek to invoke their foreign policy powers to avoid checks on their domestic authority. Any "claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 638 (1952) (Jackson, J., concurring). This Court has explained that "the political-function exception must be narrowly construed; otherwise the exception will swallow the rule and depreciate the significance that should attach to the designation of a group as a 'discrete and insular' minority for whom heightened judicial solicitude is appropriate." *Bernal*, 467 U.S. at 222 n.7. The same is true of Congress's plenary power.

Judicial deference to legislation simply because it affects aliens "is not consistent with the theory of our government." *Wong Wing*, 163 U.S. at 237. The lower courts have ceded this boundary-patrolling function to the legislative and executive branches through their misreading of *Diaz*. This Court must return this power to the judicial branch to ensure that Congress and the President do not misuse their authority over immigration to single out legal immigrants for mistreatment

for reasons having nothing to do with immigration policy. Only this Court can tell Congress and the President that the plenary power over immigration does not give them plenary power over immigrants.

IV. CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

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